

BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE #25-77:

TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN
AND HELPERS, LOCAL UNION NO. 53.

Complainant:

- 18 -

FINDINGS OF FACT.

CALLATIN COUNTY COMMISSIONERS, Commissioner George Sager, Chairman and Commissioner John Bottlemen.

CONCLUSIONS OF LAW.

RECOMMENDED ORDER

Defendants:

On August 11, 1977, the Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union #53, filed an unfair labor practice charge with the Montana Board of Personnel Appeals against Gallatin County Commissioners, George Sager and John Buttlieman. The charge alleges that Section 59-1605 (1) (a) has been violated in that the Commissioners attempted to interfere with and coerce their employees in the exercise of their rights as guaranteed in Section 59-1603(1), H.C.M. 1947.

The Commissioners denied the charge in an answer filed on August 25, 1977.

A hearing in the above captioned matter was held on September 22, 1977, in Bozeman, Montana. The Union was represented by Business Agent, Virgil Buechner; the Commissioners were represented by James Johnstone, Deputy County Attorney for Gallatin County.

As the duly appointed hearing examiner for the Board of Personnel Appeals, I conducted the hearing in accordance with the provisions of the Montana Administrative Procedures Act (Sections 82-4201 to 82-4225, R.C.M. 1947).

After a thorough review of the record of the case, I make the following:

FINDINGS OF FACT

1) That on the morning of August 9, 1977, Gallatin County

1 Commissioners George Sager and John Buttlemen were interviewed by
2 Larry Willis of the Bozeman Daily Chronicle. The subject of this
3 interview was the attempted unionization of the County Road and
4 Bridge Department. A report of the interview appeared on the
5 front page of the Chronicle the evening of August 9, 1977. The
6 newspaper article, Complainants Exhibit #1, contained the
7 following statements attributed to Commissioners Sager and
8 Buttlemen:

9 "This may cost a job or two."

10 Sager contended that the employees would lose some of
11 their fringe benefits under unionization, such as sick
leaves and vacation.

12 He said if the union movement succeeds, the departments
13 may be "cut to a skeleton crew and contract all major
work."

14 2) Testimony at the hearing indicated that the newspaper
15 article did not present a verbatim rendering of all remarks made
16 by the Commissioners. It is my opinion, however, that the article
17 accurately reflected the Commissioners' statements, sentiments
18 and meanings.

19 DISCUSSION

20 The First Amendment guarantees the right to exercise free
21 speech. This right is most fundamental to the maintenance of a
22 free and open society and is one of the most cherished rights of
23 Americans. This right, however, carries certain responsibilities
24 and restraints. In the matter at hand, the employer's right
25 stops short of threatening or coercing employees in their efforts
26 to organize or affiliate with a labor organization. Section 59-
27 1605(1) (a), R.C.M. 1947, states that:

28 (1) It is an unfair labor practice for a public
29 employer to:

30 (a) Interfere with, restrain, or coerce employees
31 in the exercise of the rights guaranteed in
section 3 of this act;

32

1 section 3 states that:

2 (1) Public employees shall have, and shall be pro-
3 tected in the exercise of, the right of self- or
4 organization, to form, join or assist any labor
5 organization free from interference,
6 restraint or coercion.

7 The National Labor Relations Board has summed up an employer's
8 rights as well as his limitations in the NLRB v. Armcoc Drainage
9 and Metal Products decision which states that an employer has
10 "the right to express his opinions on the controversy" with the
11 union "as long as no intimidation or coercion was indulged in, or
12 benefits promised, or threats made, express or implied."

13 Throughout this discussion references will be made to
14 decisions handed down by the National Labor Relations Board
15 (NLRB). The Board of Personnel Appeals is not bound by NLRB
16 precedent, yet the similarities between the statutes administered
17 by the NLRB and the Board are so obvious it would be senseless to
18 ignore those precedents.

19 In the matter at hand we have a series of statements made by
20 the employer, and reported in the Bozeman Daily Chronicle,
21 on the subject of the possible consequences of unionization. The
22 decision which must be made is whether these statements were
23 acceptable opinions or were they threats directed toward the
24 employees.

25 The NLRB has given us some guidelines in making a deter-
26 mination. In the Dal-Tex Optical¹ decision it was ruled that:

27 In determining whether an employer's statements are
28 permissible, the major issue is whether the employees
29 could find any hidden threat or promise in what was
30 said.

31 1/ NLRB v. Armcoc Drainage and Metal Products, CAG, 1955, NLRB 35 2, cert.
32 den. 63 SCCT 1955, 36 LRRM 2716.

33 2/ Dal-Tex Optical Co., NLRB 1963, 40 LRRM 1439.

1 Justice Warren writes in the matter of NLRB v. Gissel Packing
2 Co.,³:

3 An assessment of the precise scope of the employer
4 expression, of course, must be made in the context
5 of its labor relations setting. Thus, an employer's
6 rights cannot outweigh the equal rights of the
7 employees

8 Any balancing of these rights must take into
9 account the economic dependence of the employees
10 on their employer, and the necessary tendency of
11 the former, because of that relationship, to pick
12 up intended implications of the latter that might
13 be more readily dismissed by a more disinterested
14 ear.

15 An employer is free to communicate to his employees
16 any of his general views about a particular union,
17 so long as the communications do not contain a
18 "threat of reprisal or promise of benefit." He
19 may even make a prediction as to the precise
20 effects he believes unionisation will have on his
21 company. In such a case, however, the prediction
22 must be carefully phrased on the basis of objective
23 fact to convey an employer's belief as to demonstrably
24 probable consequences beyond his control.⁴

25 If there is any implication that an employer "may
26 or may not take action solely on his own initiative
27 for reasons unrelated to economic necessities and
28 known only to him", he has not made a prediction
29 but an unlawful threat.

30 Further direction comes from the River Togo, Inc.,⁵ decision
31 which states that an employer is free only to tell:

32 . . . what he reasonably believes will be the
33 likely economic consequences of unionization that
34 are outside his control.

35 In light of these decisions it appears that an employer's
36 statements are permissible under the following conditions:

37 1) That the statements contain no threats or promises,
38 express or implied

39 2) That predictions made must be beyond the control of
40 the employer.

41 3) That predictions made must be as to likely consequences,
42 be based on objective fact, and be demonstrably probable.

30 3) NLRB v. Gissel Packing Co., 365 F.2d 1, 1989, 71 LRRM 2481

31 4) Textile Workers v. Burlington N. W. Co., 380 U.S. 223, n.29, 68 LRRM 2557

32 5) NLRB v. Sinclair Co., 337 F.2d 169, 68 LRRM 2220

33 6) NLRB v. River Togo, Inc., 322 F.2d 108, 232, 63 LRRM 2982

1 In the name of and statements were made by the employer as
2 to the possible consequence of unionization. While these
3 statements were not made directly to the employees, appearing
4 rather in a newspaper article written after an interview
5 with the employer, it is assumed that the article, which was
6 placed prominently on the front page of the city's only
7 newspaper, was seen and read by at least some of the employees.
8 It should be further noted that testimony indicated that the
9 content of the newspaper article did not follow exactly the
10 wording used by the employer, and it is understood that
11 certain modifying phraseology was used in the interview
12 which did not appear in the article. There is, however,
13 ample testimony that the article accurately reflected the
14 mode, sentiment and meaning of the interview.

15 In the article, references were made to adverse conditions
16 which could take place after unionization, including job losses,
17 vacation and benefit losses. References were made to the pos-
18 sibility of contracting out major work. For the most part these
19 comments were made as possibilities, and I am confident that all
20 comments, had they been reported verbatim, would have been phrased
21 as possibilities. It is my opinion that these predictions would
22 be permissible had they predicted likely consequences, if they
23 were based on objective fact, and if these consequences were
24 demonstrably probable. It is also my opinion, that predictions
25 made by the employer do not meet any of these conditions. The
26 cost of outside contracting had not been investigated into in
27 any meaningful manner which would give a grounds for comparison.
28 Remarks made as to benefits and vacations were purely specu-
29 lative. Job losses occasioned by wage increases were assumed
30 unreasonably, and there was no support for the basic assumption
31 that the union, which had not yet even presented any demands,
32 would make such demands economically unreasonable. In short, the

1 employer made statements, which appeared in the public media, and
2 which predicted dire consequences for those employees who were
3 attempting to affiliate with the union, and that these pre-
4 dictions were not based on objective facts; that the predicted
5 consequences were not likely nor were they demonstrably probable.
6 I, therefore, find in favor of the Complainant.

7 In the future, the employer would well be guided by these
8 excerpts from previous decisions.

9 At the least, he can avoid coercive speech simply by
10 avoiding conscious overstatements he has reason to
believe will mislead his employees.

11 He can easily make his views known without engaging in
12 "brinkmanship" when it becomes all to easy to "overstep
and tumble off of the brink."

13 CONCLUSIONS OF LAW

14 That Gallatin County Commissioners, George Sager and John
15 Buttleson have violated provisions of Section 59-1605(1) (a),
16 R.C.M. 1947, and are guilty of an Unfair Labor Practice within
17 the meaning of said section.

18 RECOMMENDED ORDER

19 It is hereby Ordered, that Gallatin County Commissioners,
20 George Sager and John Buttleson;

21 1) Cease and desist from interfering with or coercing
22 employees in the exercising of the rights guaranteed them in
23 Section 59-1603(1), R.C.M. 1947.

24 Dated this 13th day of October, 1977.

25 ATTEST: (S) U.S. BOARD OF PERSONNEL APPEALS

26 BY 
27 Jeff Andrews
28 Hearing Examiner

30 7) NLRA v. Cissel Packing Co., op. cit.

31 8) NLRA v. Wisconsin Steel Corp., 377 F.2d 389, 65 LRRM 2001

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